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282314—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 606

VIKING PUMP COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 619–625) is reported in 113 F. (2d) 759. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 586–606), are reported in 13 N. L. R. B. 576.

JURISDICTION

The decree of the court below was entered on July 29, 1940 (R. 625). A petition for rehearing

filed by petitioner was denied on September 9, 1940 (R. 626). The petition for a writ of certiorari was filed on December 5, 1940. The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the Board's findings that petitioner (a) interfered with the free self-organization of its employees in violation of Section 8 (1) of the Act; (b) discriminatorily discharged two of its employees in violation of Section 8 (3) and (1) of the Act; and (c) discharged another employee for testifying in a proceeding before the Board, in violation of Section 8 (4), (3), and (1) of the Act.

2. A further question urged by petitioner but which we think is not properly presented in this case, is whether the Board may require that an employer pay over to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment on work relief projects of employees discharged by the employer in violation of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix.

STATEMENT

Upon the usual proceedings,[1] the Board issued its findings of fact, conclusions of law and order (R. 586–606). The facts as found by the Board and as shown by the evidence may be summarized as follows:[2]

About a week after a number of petitioner's employees joined the Amalgamated Association of Iron & Steel Workers in April 1937 (R. 591; 16, 19–21, 103, 198), Petersen, the foreman of the small-pump department, assembled the employees during working hours and told them that "this union business has gone far enough," that petitioner would close down the plant rather than recognize an outside labor organization, whereupon the employees would be "turned out on the street," and that, to avoid these consequences, the employees should "drop out of the union" and discuss with employees of other departments possible transforma-

[1] These, pursuant to Section 10 of the Act, were: amended charge (R. 514–515); complaint (R. 511–514); hearing (R. 1–418); Intermediate Report by the trial examiner (R. 548–558); a new charge (R. 522); a further complaint alleging the discharge of an employee because he gave testimony at the hearing held on the first complaint (R. 533); hearing on this second complaint (R. 419–510); Intermediate Report by the trial examiner (R. 568–579); and exceptions by petitioner to both Intermediate Reports (R. 559–566; 579–586).

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

tion of the Viking Aid Society, a benefit society, into an inside labor organization, which petitioner would be willing to recognize (R. 591–592; 47, 129, 203–204). A meeting was held on the following day in the plant during working hours for the purpose of selecting a committee to deal with petitioner; acting under instructions from their foremen, virtually all of the 200 production employees attended (R. 591–592; 49, 96–97, 174, 187–188, 203–204, 221, 238), as did many members of the supervisory staff (R. 592; 51–52; 159–160, 178, 188, 227, 260). Gushard, superintendent of the plant, told the employees that petitioner would not tolerate an outside labor organization in the plant, and that unless a bargaining committee was chosen immediately from the employees' own ranks, the plant would be closed down (R. 592–594; 53–54, 56–57, 98–99, 132–134, 175, 210–211, 227–228, 303, 327–329).

A committee was chosen and met with Wyth, petitioner's president; that official told the committee that he would not "deal with no C. I. O." and that he had had authority to close the plant if the employees had not held the meeting at which the committee was chosen (R. 594; 182, 485). Soon thereafter petitioner announced a general wage increase, which Superintendent Gushard attributed to the efforts of the committee (R. 594; 60–62, 100–101, 181, 288–289, 304). The Board found that the purpose of the wage increase was to discourage membership in the Union (R. 594).

In July 1937 a member of the Union was discharged and rehired a few days later upon his promise to withdraw from the Union (R. 595; 126). In the fall of that year Superintendent Gushard concededly spied upon a Union meeting "to see for my own benefit how many of our men actually went to the meeting. * * * I did not consider it spying" (R. 595; 318–323).

Ferris Aldrich and Harold Poulson, both admittedly competent employees of long service with petitioner (R. 596, 598; 6, 36, 81, 172–173, 250–352, 412, 523), were discharged on August 24 and 25, 1937, respectively (R. 596, 598; 30–31, 82). They were among the most active supporters of the Union in the plant, Aldrich being recording secretary and a member of the grievance and negotiating committees (R. 596; 17, 21) and Poulson being a founder and also "Inner Guard" of the Union (R. 598; 86). They wore their Union buttons in the plant and their membership in the Union was known to petitioner (R. 596, 598; 23, 24, 65, 86, 92). The discharges, which were made precipitately in advance of the regular pay day (R. 596, 598; 31, 87), were accompanied by statements by petitioner's president and superintendent which strongly suggest that the men were discharged because of their union membership and activities (R. 596, 599–600; 31, 35–38, 91–92). Petitioner's tardy (R. 340, 344) reliance upon various acts of misconduct which it attributed to Aldrich

and Poulson plainly did not present the true reason for their severance (R. 596–598, 599; 10, 34, 66–67, 69, 77–78, 92, 112–116, 141, 161, 243, 250–251, 259, 262–263, 270–271, 274, 276, 279, 282, 289–290, 292, 306–307, 317, 337–346, 362, 396, 398, 402, 406, 409–410, 412, 523, 563).[3]

On April 29, 1938, at the hearing on the first complaint, Lloyd L. Siglin, a janitor at petitioner's plant, testified that while cleaning petitioner's conference room about a week before the hearing, he chanced upon a scrap of paper bearing the notation, "Find something on Poulson and Aldrich" and that he made a copy of the paper and turned it over to the Board's attorney (R. 600–601; 140, 143–149). On the same day that Siglin testified, petitioner had him turn in his key and at a conference with the Board's attorney held the next morning petitioner refused to reinstate Siglin as janitor but offered to give him other employment (R. 601; 429–432, 499). Siglin was given one week of temporary work but was again dismissed shortly after the close of the first hearing (R. 601–602; 432–435, 439, 441–442, 494).[4] The Board found

[3] Petitioner's assertion that Poulson and Aldrich were given previous warning about these activities (Pet. pp. 14, 15) finds no support in the record and is untenable in view of the contrary testimony of Gushard and the foremen under whom Aldrich and Poulson worked (R. 597, 599; 307, 341, 292, 276).

[4] When Siglin first reported for work pursuant to petitioner's promise of a new job, President Wyth applied an obscene epithet to him and directed his superior to send him home (R. 434). Upon his second discharge, Siglin was not permitted to

that Siglin's assignment to temporary work was designed "to forestall action by the Board while the hearing was in progress" and that the discharge was in violation of Section 8 (4), (3), and (1) of the Act (R. 602–603).

Upon the foregoing findings, the Board ordered petitioner to cease and desist from the unfair labor practices found; to offer reinstatement with back pay to Aldrich, Poulson, and Siglin; to pay to governmental relief agencies sums equal to the amounts disbursed by those agencies for the employment of the three men on work relief projects; and to post appropriate notices (R. 605–606).

On February 2, 1940, the Board filed in the court below a petition for enforcement of its order against petitioner (R. 607–610). On July 29, 1940, the court handed down its opinion (R. 619–625) and entered a decree (R. 625–626) enforcing the Board's order in full. A petition for rehearing filed by petitioner was denied on September 9, 1940 (R. 626).

ARGUMENT

1. Petitioner's contention (Pet. 3–4, 8–9) that the Board's findings of unfair labor practices are not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra*, pp.

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enter the plant to get his coat and pay check (R. 445–446). His wife had done laundry work for petitioner; when Siglin testified, this work abruptly ceased (R. 601; 448–449, 451–453).

3–7) affords abundant support for the challenged findings. The contention that, in holding petitioner responsible for the anti-union acts of its supervisory employees despite the absence of authorization or ratification of those acts by petitioner, the Board and the court below have rejected "established rules of agency" (Pet. 13), is disposed of by the decision of this Court in *International Association of Machinists* v. *National Labor Relations Board,* No. 16, this Term, decided November 12, 1940. Further, the evidence summarized above shows that the foremen, in interfering with the employees' rights of self-organization, merely emulated the actions of petitioner's president and plant superintendent. Petitioner also contends (Pet. 3) that in holding that the Board's findings as to Aldrich and Poulson have the requisite evidentiary support the decision below is in conflict with the decision in *Empire Furniture Corp.* v. *National Labor Relations Board,* 107 F. (2d) 92 (C. C. A. 6); however, that case turned, like the present case, upon its own particular facts.

2. Petitioner contends (Pet. 4–5, 18) that the decree below, insofar as it enforces the provision (R. 605–606) of the Board's order requiring petitioner to pay over to governmental relief agencies sums equal to the amounts disbursed by those

agencies for the employment on work relief projects of the three employees illegally discharged by petitioner, is contrary to the subsequent decision of this Court in *Republic Steel Corp.* v. *National Labor Relations Board,* No. 14, this Term, decided November 12, 1940. But in the present case petitioner raised no question in the court below concerning the "work relief" provision; that provision was not specifically challenged either in the answer to the Board's petition for enforcement (R. 614–618) or in petitioner's briefs.[5] The court below made no mention of the provision, even in its summary of the Board's order (R. 619–620), and the point was not raised in the petition for rehearing.[6] This Court has recently indicated that it does not regard a decree entered under such circumstances as an adjudication upon the validity of the "work relief" provision. *J. Greenebaum Tanning Co.* v. *National Labor Relations Board,* No. 152, this Term, certiorari denied, October 14, 1940;

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[5] Petitioner's briefs below attacked the Board's findings and order as not supported by substantial evidence; they made no mention of the work-relief provision. Brief and reply brief for respondent, No. 470, Original, Circuit Court of Appeals for the Eighth Circuit.

[6] The petition for rehearing, which is omitted from the printed record (R. 626), merely renewed petitioner's challenge of the sufficiency of the evidence. Petition of Viking Pump Company for Rehearing, No. 470, Original, Circuit Court of Appeals for the Eighth Circuit.

Subin v. *National Labor Relations Board*, No. 280, this Term, certiorari denied, October 14, 1940.[7]

CONCLUSION

The petition presents no question of general importance, and there is no conflict of decisions; it should, therefore, be denied.

Respectfully submitted.

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[7] In briefs filed by the Board in the Circuit Courts of Appeals since the decision of this Court in the *Republic* case, the Board has affirmatively requested that the "work relief" provision be eliminated from its order. E. g., brief for respondent, *Eagle Picher Mining & Smelting Co.* v. *National Labor Relations Board*, No. 460, Original, Circuit Court of Appeals for the Eighth Circuit, p. 61; brief for petitioner, *National Labor Relations Board* v. *Mall Tool Co.*, No. 7476, Circuit Court of Appeals for the Seventh Circuit, pp. 26–27; brief for petitioner, *National Labor Relations Board* v. *Texas Mining & Smelting Co.*, No. 9539, Circuit Court of Appeals for the Fifth Circuit, pp. 31–32.